

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT MITCHELL,

Plaintiff,

v.

NURSE DIAZON, et al.,

Defendants.

Case No. C10-2075-RAJ-BAT

**REPORT AND
RECOMMENDATION**

Plaintiff Robert Mitchell, a Washington State prisoner, is proceeding pro se and in forma pauperis in this civil rights action under 42 U.S.C. § 1983. Previously, the Court declined to order service of plaintiff's complaint and granted him leave to file an amended complaint. Dkt. 8. Plaintiff has now filed an amended complaint. Dkt. 12. The Court, having reviewed plaintiff's amended complaint, recommends as follows:

(1) Plaintiff's first, second, and fourth claims should be **DISMISSED** for failure to state a claim on which relief can be granted under 28 U.S.C. § 1915(e)(2)(B)(ii);

(2) Defendant Supervisor David Oster should be **DISMISSED** from this case; and

(3) Plaintiff's complaint should be **SERVED** on defendant Nurse Diazon and she should be directed to file an answer as to claim three.

Plaintiff raises four claims in his amended complaint: (1) Oster improperly classified

1 plaintiff and denied him access to the law library; (2) plaintiff received inadequate clothing and
2 no coat for use outside; (3) Nurse Diazon provided plaintiff inadequate medical treatment by
3 failing to provide him with medications despite his requests; and (4) plaintiff's cell had no
4 working outlet, there was no "level program," and the book selection was limited and included
5 only Christian religious books. He names Nurse Diazon and Supervisor David Oster as
6 defendants. He seeks compensatory and punitive damages.

7 Previously, the Court informed plaintiff that to sustain a § 1983 civil rights action, a plaintiff
8 must show (1) he suffered a violation of rights protected by the Constitution or created by federal
9 statute, and (2) that the violation was proximately caused by a person acting under color of state
10 or federal law. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). To satisfy the
11 second prong, a plaintiff must allege facts showing how individually named defendants caused or
12 personally participated in causing the harm alleged in the complaint. *See Arnold v. IBM*, 637
13 F.2d 1350, 1355 (9th Cir. 1981). A defendant cannot be held liable solely on the basis of
14 supervisory responsibility or position. *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 691-694
15 (1978). Rather, a plaintiff must allege that a defendant's own conduct violated the plaintiff's
16 civil rights. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385-90 (1989).

17 **Claims two and four:** Plaintiff's second and fourth claims do not identify a defendant who
18 caused or personally participated in causing the alleged harm. He does not allege that either of
19 the named defendants was involved with these claims. Because plaintiff has failed to allege that
20 that the harm was proximately caused by a person acting under color of state or federal law,
21 these claims should be **DISMISSED**.

22 **Claim one:** Plaintiff's first claim alleges that Oster, a classification supervisor, improperly
23 classified him. Prisoners do not have a constitutional right to a particular classification status.

1 *See Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976); *Myron v. Terhune*, 476 F.3d 716, 718 (9th
2 Cir. 2007). Plaintiff therefore cannot state a claim against Oster for improperly classifying him.

3 Plaintiff's first claim also alleges that Oster also denied him access to the law library even
4 though Oster knew plaintiff had an active case. Prisoners have a constitutional right of access to
5 the courts, which includes the ability to use a law library or other adequate assistance. *Bounds v.*
6 *Smith*, 430 U.S. 817, 828 (1977). To establish a violation of this right, a prisoner must show that
7 he has suffered an actual injury, meaning actual prejudice with respect to contemplated or
8 existing litigation, such as the inability to meet a filing deadline or to present a claim. *Lewis v.*
9 *Casey*, 518 U.S. 343, 348 (1996). Plaintiff does not identify any actual injury caused by Oster's
10 denial of law library access. Plaintiff submitted a letter from Oster stating that the Ninth Circuit
11 Court Clerk had confirmed that there were no filings due in plaintiff's case and the case was
12 awaiting a merits determination by a three-judge panel. Oster stated that if the panel determined
13 the case had merit, that would change plaintiff's status and he could request law library access at
14 that time. Plaintiff has not shown that Oster's denial of law library access violated his
15 constitutional right of access to the courts. Because plaintiff has failed to state a claim against
16 Oster, claim one and defendant Oster should be **DISMISSED**.

17 Where a pro se litigant's complaint fails to state a claim on which relief may be granted, he
18 is entitled to an opportunity to amend the complaint unless it is clear that the deficiency cannot
19 be cured. *Lucas v. Dep't of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam). The
20 Court gave plaintiff notice of the defects in his original complaint and the opportunity to correct
21 those defects. Plaintiff's amended first, second, and fourth claims remained defective. The
22 Court does not believe that granting plaintiff a second opportunity to amend these claims would
23 result in claims on which relief can be granted. However, if plaintiff believes that amending his

1 complaint can cure the defects in these claims, he should file an amended complaint as part of his
2 objections, if any, to this Report and Recommendation.

3 **Claim three:** Plaintiff's third claim alleges that Nurse Diazon provided him inadequate
4 medical treatment by failing to provide him with medications despite his requests. This claim
5 states a claim for relief under the Eighth Amendment. Accordingly, plaintiff's complaint should
6 be **SERVED** on Nurse Diazon and she should be directed to file an answer as to claim three.

7 A proposed order accompanies this Report and Recommendation.

8 DATED this 2nd day of May, 2011.

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BRIAN A. TSUCHIDA
12 United States Magistrate Judge
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